

Moody (Migration) [2023] AATA 1963 (26 May 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mrs Reyna Vergara Moody Master Gaebriel Vergara Ambos
CASE NUMBER:	2101918
HOME AFFAIRS REFERENCE(S):	BCC2019/2943866
MEMBER:	Donna Petrovich
DATE:	26 May 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2)(a) of Schedule 2 to the Regulations • cl 820.221(1)(a) of Schedule 2 to the Regulations The Tribunal gives direction that it follows as the first named applicant meets the criteria that the Secondary applicant therefore also meets the criteria

Statement made on 26 May 2023 at 2:18pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – 12-month de facto requirement – compelling reasons for the waiver – longevity of relationship – provision of a family environment to the children – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The first named applicant (the applicant) applied for the visa on 10 June 2019 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211(2)(a) was not satisfied that the applicant and sponsor were in a de-facto relationship for over 12 months prior to their application. The delegate was not satisfied that the relationship was genuine and continuing.

5. Background

6. The applicant is a 46 year old Philipino women who worked as a Civil Engineer and also a teacher in the Philippine's and has a son Gaebriel Vergara Ambos who is now 14 years old. The applicant and sponsor met on-line in 2018 and started communicating via email and then Facebook Messenger for about 12 months and met for the first time when the sponsor visited her in the Philippine's where they spent two weeks together.
7. The Sponsor has been Married twice previously and has 4 children from those Marriages which he pays Maintenance for. He works as a Bus Driver for Ventura Bus Lines on a 42 hour rotating roster.
8. The applicant came to Australia on 18 May 2019, with her son Gaebriel, on a Tourist visa and the applicant and sponsor were Married on 16 June 2019.
9. The applicant explained that they were concerned about changes in the way a Partner Visa was applied for which required that the Sponsor pre-apply before a Partner visa could be applied for.
10. The applicant and sponsor could not afford financially for the applicant to return to the Philippine's and so they immediately prioritised their application to the Department which was unfortunately less than the 12 months required.
11. They were Married on 16 June 2019, on this basis there was 6 days between lodgement of the application and their Marriage which occurred on 16 June 2019.
12. The applicant gave birth to a little boy on 1 March 2023, Zakkeaus Mark Moody who is now 1 ½ years. The applicant and sponsor live in a rental property and pay \$1652 for their Cranbourne property, which is reasonably priced rent for the area. They are reliant on the sponsors wage as the applicant has been unable to secure work and is the primary care giver to the children and is responsible for household duties.

13. The applicants appeared before the Tribunal on 25 May 2023 to give evidence and present arguments. The Tribunal also received oral evidence from Master Gabriel Vergara Ambos, Ms Georgina Horiana Jahnke, Mr David Mark Moody, and Ms Roshan Grebe.
14. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The issue in the present case is whether the applicant and sponsor were in a de-facto relationship 12 months prior to the lodgement of the partner visa application. Under the legislation the 12 month de facto requirements may be waived if the applicant can establish compelling reasons for the waiver

Whether the parties are in a spouse or de facto relationship

16. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
17. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

18. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant and sponsor provided proof of Marriage by providing the Tribunal with a Marriage Certificate obtained in Melbourne, Australia on 23 July 2019. The applicant and sponsor provided some photographic evidence of their wedding ceremony and statements from the Celebrant and friends in attendance. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

19. Financial aspects of the relationship

20. The Tribunal received evidence and submissions that the applicant was financially fully supported the sponsor who also supported the applicant's son and their biological child. The Tribunal heard that they had a joint account which all of the sponsors pay is directed and the applicant had access to these funds, that they usually shopped together, and that the applicant took pride in shopping frugally from Aldi supermarket. They have purchased furniture for their rented property together and have purchased a car which they share. The Sponsor pays all of their Bills as he is the most financially literate. The applicant has been

unable to find work although she has applied and would like to contribute when their baby is a little older.

21. The Tribunal has considered the evidence and is satisfied that as a family, who's main wage earner has other dependants from previous relationship to support, and a single income, which provided for his family paying rent, and other expenses, and has savings which enable the family to go on holidays together in Victoria, touring and sightseeing. That there is a genuine pooling of financial resources by the sponsor who works and supports his family, and the applicant who prides herself on living and shopping frugally which enables them to live well. There was also evidence submitted that they may move to Roma in QLD which would enable them to find work for the applicant as there are greater job opportunities there, which would increase their ability to earn, save and purchase their own home. The Tribunal places some weight in favour of the applicant, on the basis that there is a genuine budgeting of family income by the applicant and sponsor and insight into financial management of their financial resources.

22. Nature of the Household

23. The applicant told the tribunal that she is the Primary care giver of her son and the couple's biological son. The applicant explained that the sponsor is involved in a range of activities with the children and has encouraged his step-son to learn to play music and purchased a piano, drums and guitars, and he proudly submitted that he was now a very good musician and has been largely self-taught. The applicant does the majority of the housework and is assisted by the sponsor in his free time. The Tribunal accepts that the applicant takes care of the household and childcare by agreement with the sponsor who works full time and is responsible for paying bills and other administrative responsibilities. The Tribunal gives some weight in favour of the applicant.

24. Social aspects of the relationship

25. The Tribunal heard that the applicant and sponsor were involved in Restore Community Church, which they attended together with their children. They were also part of the volunteer community that assisted with cleaning of the church and also the community food bank for members of the community in need. The Tribunal heard from their friend who hosts a fellowship group, and she meets with them and others socially also for dinner at their homes or sometimes for lunch. She provided evidence of the nature of their relationship and the high esteem that they are held. The Tribunal also received evidence from the Pastor of the church who told the Tribunal that she had witnessed their commitment to each other and their family through their participation at church and their demonstrated affection for each other and their children. The Tribunal accepts the evidence and submissions given by the applicant, sponsor and the witness who appeared at the Tribunal in person and via telephone and places some weight in favour of the applicant based on the evidence provided.

26. Nature of persons commitment to each other

27. The Tribunal heard that the applicant and sponsor have been committed to each other from when the sponsor left the Philippines after their first meeting and spending two weeks together.
28. They have lived together continuously since the applicant and her son came to Australia and have since married and had another child, who is now 1 and ½ years old.

29. They have strong connections to their local church, attending services and are social members of the church community, socialising and volunteering in the church and broader community. They participate in all of these activities as a couple and as a family.
30. They told the Tribunal at the hearing that they have researched the possibility of moving to Roma in Queensland where there is affordable housing and work for the sponsor driving trucks and the applicant in a variety of roles. They are contemplating this as they are concerned about availability of rental properties and rising rents in Victoria.
31. The Tribunal has considered all of the evidence provided at the hearing and previously and is satisfied that the applicant and sponsor provide strong emotional support to each other and are looking and planning for a long- term future together with their children. The Tribunal places strong weight in favour of the applicant.

32. Any other circumstances

33. The Tribunal has considered the submissions and finds that there are compelling reasons for the waiver of the 12 month de facto requirement to be waived and have been established.

34. Compelling Reasons

35. The Tribunal has considered the explanation made by the applicant and sponsor for their application which was made prior to the 12 month de facto requirement.
36. The applicant explained to the Tribunal that they had applied as they were told that changes to the requirements would mean that the sponsor need apply prior to the application, and the timing of this would mean that the applicant and her son would have needed to return to the Philippines. The applicant explained that although they knew this was the case their finances would not have extended to the additional cost.
37. The Tribunal has considered the applicant and sponsors evidence and accepts that their circumstances have changed significantly. That they are now Married, with a child of the relationship, as well as the applicant's now 14 year old son, who views the sponsor as his father. They have established themselves as a family and have maintained a relationship for the past 4 years and have demonstrated to others in the community that they are in a long-term relationship and have made contributions to the community through their voluntary work.
38. The Tribunal supports the Waiver of the 12 month de-facto requirement based now on the longevity of their relationship and that they provide a family environment for the applicants biological child and (secondary applicant) in this application and that they now are parents to their own biological child.
39. The effect of the Tribunal not supporting the waiver and in turn the application would have potentially far reaching financial, emotional and psychological effects on the applicant and her two children and on the sponsor an Australian citizen who would be separated from his biological child and his step- son and their Mother.
40. Under these circumstances the Tribunal finds that the applicant has established compelling reasons and that the waiver of the 12 month de-facto relationship requirement be waived as prescribed under the legislation.

The Tribunal finds that the applicant and sponsor have a mutual commitment to shared life to the exclusion of others; and a genuine and continuing relationship; and that they live together / not separately and apart on a permanent basis.

41. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made and the time of this decision.
42. Therefore, the applicant meets cl 820.211(2)(a) and cl 820.221 (1)(a).
43. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

44. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl 820.211(2)(a) of Schedule 2 to the Regulations
 - cl 820.221(1)(a) of Schedule 2 to the Regulation

Donna Petrovich
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).